CIVIL REVISION APPLICATION NO. 2016, 2017, 2018
2019 AND 2020 OF 1996.

Date of decision: 25.2.1997

For approval and signature

The Honourable Mr. Justice R. R. Jain

Mr. S.B. Vakil for Ms. J.H. Shah in C.R.A.Nos.2016 and 2017 of 1996 for petitioner.
Mr. H.B. Shah, advocate for petitioner in C.R.A.Nos. 2018, 2019 and 2020 of 1996.
Mr. B. Y. Mankad, A.G.P. for respondents in all the C.R.As.

1. Whether Reporters of Local Papers may be allowed to see the judgment?

2. To be referred to the Reporter or not?

3. Whether their Lordships wish to see the fair copy of judgment?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

Coram: R.R.Jain,J.

February 25, 1997.

Oral judgment:

Since all these matters are between same parties involving identical question of law and facts, are

disposed of by this common judgment.

Initially in all these matters notice was issued and in response to the notice the respondent- State of Gujarat appeared through the Government Pleader, High Court of Gujarat. After hearing both the parties, Rule was issued on 3.2.1997 and interim relief as prayed for was granted in favour of the petitioner.

In order to appreciate the controversy between the parties, few facts giving rise to these applications are required to be placed on record.

The petitioner is a contractor and entered into an agreement with the State of Gujarat for construction of some projects. From the record it appears that separate contracts were awarded to the petitioner for different works. Subsequently, as dispute arose between the parties, the matters were referred to arbitrator. It appears that in all there were six arbitration references and all have been decided in favour of the petitioner. In one of the references, the arbitrator awarded a sum of Rs.90,94,860/- The total amount of award along with interest accruing thereon has been paid to the petitioner unconditionally somewhere in the year 1994. After making payment of the amount of the award, the respondents thought it fit to challenge and have now challenged of the award before the Arbitration Tribunal and the same is pending.

Since five other awards also operated in favour of the petitioner, the petitioner called upon the respondents to make payment. As the respondents failed to make payment, filed Execution proceedings in the court of learned Civil Judge (S.D.)., Gandhinagar, being Darkhast Nos. 42 to 46 of 1995. The total amount of claim in all these Darkhasts is Rs.58,38,801.29. The petitioner also filed application for Garnishee order vide application Ex.46 and the learned Judge, taking recourse to clause 43A of the agreement, which is binding to both the parties, rejected the application. Aggrieved by that order the petitioner/plaintiff has preferred these revision applications.

Heard Mr. Shah for the petitioner and Mr. Mankad, A.G.P. for the respondent- State.

From the tenor of argument of Mr. Mankad, it appears that there is no dispute about the amount to be paid to the petitioner to the tune of Rs.58,38,801.29 under the awards. But the only argument advanced is that since the

State Government has already preferred appeal against the another award the amount which has already been paid to the petitioner, the amount so paid now becomes the claim of the respondents and is required to be set off against the claim of the present Darkhast proceedings. In order to appreciate this contention, Mr. Mankad has placed reliance upon clause 43A which reads as under:

> "Any sum of money due and payable to the contractor (including security deposit refundable to the contractor) under this contract shall be appropriated by the Government and shall be set off against any claim of the Government for the payment of a sum of money arising out of or under any other contract made by the contractor with the Government. When no such amount for the purpose of recovery from the contractor against any claim of the Government is available, such a recovery shall be made from the contractor as arrears of land revenue."

It is true that while taking recourse to this clause, the respondent Government can claim set off for any claim against the sum of money due and payable by the contractor. To illustrate this, suppose in a contract the contractor has claimed X amount from the Government. Against that if the Government is having some other claim against the contractor to be recovered, may be arising from same contract or some other contract, the Government can claim set off against the amount payable to the contractor, that is, the amount of X claimed. While making payment of said X sum due and payable to the contractor the same shall stand reduced to the extent of claim of Government for which set off is claimed. As regards interpretation of clause 43A as above, Mr. Shah for the petitioner has no dispute.

Now placing reliance upon this clause the court below has held that as the award under which payment has been made has been challenged on merits before the competent authority the amount so paid under the award now becomes the claim of the Government and the Government/respondent can claim set off against any other sum of money due and payable to the contractor. In my view, a patently erroneous view has been taken while interpreting clause 43A referred to above. The sum of Rs.90,94,860/- has been paid against a legal and enforceable order passed by a competent authority, a Domestic Tribunal, i.e., an arbitrator. It was an adjudicated claim and legally payable by the respondent and has been paid accordingly. Merely because subsequently that order has been

challenged before appropriate forum the amount so paid does not become a claim of Government to be recovered from the petitioner/contractor. At the most if the award under which the amount is paid is altered, reversed, amended or modified by competent authority in appeal, revision or in any other proceeding then the respondents can claim for restitution under Section 144 of the Civil Procedure Code. But till the award is not set aside the respondent has no right to recover the same. If the order under challenge has been amended, altered or modified then only the respondent becomes entitled to refund or restitution from the petitioner. Thus, till the award remains in force it cannot be said that the amount paid to the petitioner under that order is a claim as contemplated under Section 43A referred to above merely because the award has been challenged in a higher forum.

In order to exercise option of set off as contemplated under clause 43A, a claim must be ascertained undisputed and legally recoverable and must be between the same parties. A claim which may arise in future on happening of particular events does not become recoverable under clause 43A. Consequently, respondents' contention that in the event the appeal is allowed and award is set aside the amount paid would become recoverable as claim, cannot be taken into consideration as on today while interpreting scope of clause 43A.

In the result, while defending the claim arising under the Darkhast Proceedings recourse cannot be taken to clause 43A and claim set off for the amount paid under a legal and subsisting award. Under these circumstances, the impugned order passed below Ex.46 is patently erroneous and illegal and deserves to be set aside. Accordingly, the impugned order dated 8.11.1996 passed below Ex.46 in all the aforesaid Darkhast Proceedings is hereby quashed and set aside. The Garnishee order issued in terns of para 6 (a) of Ex.46 is hereby confirmed and made absolute. The Court below shall proceed further and decide the proceedings in accordance with law. Rule is made absolute to the aforesaid extent. No order as to costs.